(2)

No. 91-1720

Supreme Court, U.S.
FILED
JUN 26 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

JESUS JOSE CASTRO-VASQUEZ
AND LUZ MARLENE CASTRO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction over an appeal from an *in rem* forfeiture proceeding after the *res* was removed from the court's jurisdiction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	5
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Republic National Bank v. *United States*, cert. granted, 112 S. Ct. 1159 (1992)	4, 5
United States v. *$1,322,242.58*, 938 F.2d 433 (3d Cir. 1991)	4
United States v. *$12,390*, 956 F.2d 801 (8th Cir. 1992)	4
United States v. *$79,000 in U.S. Currency*, 801 F.2d 738 (5th Cir. 1985)	4
United States v. *$95,945.18, United States Currency*, 913 F.2d 1106 (4th Cir. 1990)	4
United States v. *A 1985 Cadillac Fleetwood*, No. 91-3388 (6th Cir. Sept. 12, 1991), petition for cert. pending *sub nom. Price* v. *United States*, No. 91-1141	4
United States v. *Aiello*, 912 F.2d 4 (2d Cir. 1990), cert. denied, 111 S. Ct. 757 (1991)	4
United States v. *One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.), cert. denied, 487 U.S. 1204 (1988)	4
United States v. *One Lot of $25,721.00 in Currency*, 938 F.2d 1417 (1st Cir. 1991)	4
United States v. *Tit's Cocktail Lounge*, 873 F.2d 141 (7th Cir. 1989)	4

Statutes:

18 U.S.C. 981	3, 5
18 U.S.C. 981(a)(1)(A)	2
18 U.S.C. 981(c)	3
21 U.S.C. 881	4, 5

Statutes—Continued: Page

31 U.S.C. 5313(a) 2
31 U.S.C. 5324(3) 2

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1720

JESUS JOSE CASTRO-VASQUEZ
AND LUZ MARLENE CASTRO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10-17) is unreported, but the judgment is noted at 946 F.2d 899 (Table). The order of the district court is unreported, but is reprinted as an appendix to this brief. App., *infra*, 1a-5a.

JURISDICTION

The judgment of the court of appeals was filed on October 8, 1991. A petition for rehearing was denied on January 30, 1992. Pet. App. 18-19. The petition for certiorari was filed on April 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between 1987 and 1989, petitioners made 127 deposits totalling over $900,000 in accounts at three Arizona banks. Each of the deposits was for an amount less than $10,000. On 35 days during this period, petitioners made a total of 81 deposits of less than $10,000. Pet. App. 11; App., *infra*, 1a, 3a; Gov't C.A. Br. 4.

On May 11, 1989, the Internal Revenue Service seized $390,047.55 in the accounts. On May 16, 1989, the United States filed an *in rem* action in the United States District Court for the District of Arizona seeking forfeiture of the seized funds under 18 U.S.C. 981(a)(1)(A). The United States alleged that petitioners had intentionally structured the deposits, in violation of 31 U.S.C. 5324(3), to avoid the requirement of 31 U.S.C. 5313(a) that any bank receiving a deposit in excess of $10,000 file a report of the transaction with the Secretary of the Treasury. Pet. App. 11; Gov't C.A. Br. 3, 4.

2. The district court held that there was probable cause to believe that petitioners had intentionally structured the deposits to avoid the reporting requirements. In particular, the court found that petitioners' 81 deposits of less than $10,000 on 35 days showed an intent to structure the deposits. App., *infra*, 3a. Accordingly, the court ordered the funds forfeited to the United States under Section 981(a)(1)(A). Pet. App. 11.

Petitioners filed a notice of appeal, but they failed to seek a stay of judgment or obtain a supersedeas bond to prevent execution of the court's order. On October 5, 1990, the United States Marshal executed the order and transferred the forfeited funds to the Department of Justice Assets Forfeiture Fund in the United States Treasury. Pet. App. 11-12. The

government then moved to dismiss the appeal on the ground that *in rem* jurisdiction over the property terminated once the funds were removed from the district court's control.

3. The court of appeals dismissed petitioners' appeal. Pet. App. 10-17. It explained that "[t]he court's subject matter jurisdiction over an *in rem* action terminates once the property involved is removed from the court's control." *Id.* at 13. In applying this rule to petitioners' appeal, the court noted that petitioners "are represented by competent counsel" and that "[t]hey made no attempt to obtain a stay of judgment in order to preserve the court's jurisdiction." *Id.* at 15. The court also rejected the argument that it could retain jurisdiction over the forfeited funds pursuant to 18 U.S.C. 981(c), which provides that property forfeited under Section 981 "shall be deemed to be in the custody of the Attorney General, the Secretary of the Treasury, or the Postal Service * * * subject only to the orders and decrees of the court or the official having jurisdiction thereof." The court held that Section 981(c) applies "only * * * to the exertion of custodial authority over the *res* while a forfeiture action is pending. It does not allow a court to retain control over the property after the execution of a valid forfeiture order." Pet. App. 16. Finally, the court held that it did not have *in personam* jurisdiction over the appeal because the case was a traditional *in rem* action subject to *in rem* jurisdictional principles. *Id.* at 17.

ARGUMENT

Petitioners contend (Pet. 4-8) that the court of appeals erred in dismissing their appeal of the district court's order forfeiting their funds to the government. As petitioners point out, there is a conflict in

the courts of appeals over whether, in an *in rem* forfeiture proceeding, the removal of the *res* from the geographic jurisdiction of the court deprives the court of jurisdiction.*

On February 24, 1992, this Court granted the petition for a writ of certiorari in *Republic National Bank* v. *United States*, 112 S. Ct. 1159. That case presents the question whether the removal of the *res* from the district in an *in rem* forfeiture proceeding deprives the court of appeals of jurisdiction. In *Republic National Bank*, the government filed an *in rem* action under 21 U.S.C. 881 seeking the forfeiture of a single-family residence. While the case was

---

* In addition to the court of appeals in this case, the Seventh and Eleventh Circuits adhere to the view that judicial control of the *res* is a prerequisite to *in rem* jurisdiction. See *United States* v. *Tit's Cocktail Lounge*, 873 F.2d 141, 143 (7th Cir. 1989); *United States* v. *One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (en banc), cert. denied, 487 U.S. 1204 (1988). In a recent unpublished decision, the Sixth Circuit agreed with the Seventh, Ninth, and Eleventh Circuits. See *United States* v. *A 1985 Cadillac Fleetwood*, No. 91-3388 (6th Cir. Sept. 12, 1991), petition for cert. pending *sub nom. Price* v. *United States*, No. 91-1141 (filed Jan. 10, 1992). The Fifth Circuit also appears to adhere to that rule. See *United States* v. *$79,000 in U.S. Currency*, 801 F.2d 738, 739 (5th Cir. 1986). On the other hand, four courts of appeals take the view that even after the departure of the *res* from the jurisdiction of the court, the court retains jurisdiction over the government and thus may order the government to return forfeited funds. *United States* v. *$12,390*, 956 F.2d 801 (8th Cir. 1992); *United States* v. *One Lot of $25,721.00 in Currency*, 938 F.2d 1417, 1419 (1st Cir. 1991); *United States* v. *$95,945.18, United States Currency*, 913 F.2d 1106, 1109 (4th Cir. 1990); *United States* v. *Aiello*, 912 F.2d 4, 7 (2d Cir. 1990), cert. denied, 111 S. Ct. 757 (1991). See also *United States* v. *$1,322,242.58*, 938 F.2d 433, 437-438 (3d Cir. 1991) (declining to apply the rule that the departure of the *res* from the jurisdiction of the court deprives the court of jurisdiction when the *res* is money).

pending in the district court, the house was sold and the proceeds deposited with the United States Marshal. Following a bench trial, the district court issued a final judgment of forfeiture. The claimant appealed, but failed to post a supersedeas bond or seek a stay of the district court's judgment. The United States Marshal then transferred the proceeds of the sale of the house into the Department of Justice Assets Forfeiture Fund of the United States Treasury. Because the *res* was no longer within the court's control, the court of appeals dismissed the appeal.

Although this case involves forfeiture under 18 U.S.C. 981 rather than 21 U.S.C. 881, the Court's decision in *Republic National Bank* is likely to control the resolution of the jurisdictional issue in this case. In this case, as in *Republic National Bank*, the court of appeals dismissed the appeal because the *res* was no longer subject to the control of the district court. We therefore suggest that the Court hold the petition for a writ of certiorari in this case pending its decision in *Republic National Bank*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Republic National Bank* v. *United States*, cert. granted, 112 S. Ct. 1159 (1992), and then disposed of in light of the decision in that case.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

JUNE 1992

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO. CIV 89-262-TUC-WDB

UNITED STATES OF AMERICA, PLAINTIFF

vs.

$390,647.55 IN U.S. CURRENCY, DEFENDANT

ORDER

[Filed July 31, 1990]

This is a forfeiture case alleging that defendant currency was involved in structured transactions. The claimant, Jesus Castro-Vasquez made multiple deposits on the same day to different bank accounts, the individual deposits being less than $10,000, but the sum total exceeding $10,000. Claimant made such deposits on thirty-five different days during a three year period.

During the three year period, over $900,000 was deposited into three identified accounts. The deposits from the thirty-five days in question totaled more than $600,000. Thus, the government claimed probable cause that the $390,000 seized in the accounts, was from structured transactions.

Burden of Proof

The parties dispute who has the burden of proof in this case. The government contends that it only need present probable cause, after which the burden shifts to the claimant. This position is based on *U.S.* v. *One-56 Foot Yacht Named Tahuna*, 702 F.2d 1276 (9th Cir. 1982). However, that case is based on a different forfeiture statute. The claimant contends that the government has the burden of proof and cited a case from the Western District of New York for the proposition. *U.S.* v. *Scanio*, 705 F. Supp. 768 (W.D.N.Y. 1988). That case, though, is a criminal case and, thus, distinguishable from the one at bar.

More appropriate for review, is a 1989 case from the Southern District of New York. In *U.S.* v. *316 Units of Municipal Securities*, 725 F. Supp. 172 (S.D.N.Y 1989), the Court found that although the prior criminal trial had resulted in the finding that the defendants had no knowledge that structuring transactions was illegal, the Court was not collaterally estopped from redetermining the issue. The Court recognized that the civil standard was less burdensome than the criminal standard and, therefore, while the defendants might not be criminally guilty, they could be civilly liable.

The Court, in that case, noted that the government had the burden of proof only to establish a *prima facie* case for forfeiture. *316 Units*, 725 F. Supp. at 177 (citing *United States* v. *Banco Cafetero Panama*, 797 F.2d 1154, 1160 (2nd Cir. 1986); *United States* v. *One 1986 Mercedes Benz*, 846 F.2d 2, 4 (2d Cir. 1988)). The Government has the burden of showing probable cause for both the prohibited conduct and the specific intent required by the statute. *Id.* There is no disputing the fact that the prohibited conduct occurred. At issue is only whether or not claimant had the specific

intent to evade either the statute or its reporting requirements.

Claimant's counsel argued at trial that the law in question requires "intent." The law states

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> . . .
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

31 U.S.C. § 5324. Thus, the law clearly states that the claimant must have had the intent to abuse the currency reporting requirements.

The Court in *316 Units* determined that to make the *prima facie* case for specific intent,

> knowledge or awareness of the reporting requirements need not be proven by direct evidence in a criminal prosecution, but may be established through inference from circumstantial evidence, such as participation in a structuring scheme, the elaborate nature of which serves no useful purpose other than that of evading federal reporting requirements.

316 Units, 725 F. Supp. at 180. By showing the eighty-one deposits on the thirty-five days in question, the government has provided just such circumstantial evidence. Thus the government has met its burden of proof, showing probable cause for the prohibited conduct and the specific intent.

When the government has established probable cause, the burden of proof shifts to the claimants. *Id.* at 179. Claimants must show "by a preponderance of

the evidence that the factual predicates for forfeiture has not been met." *Id.* (citing *Banco Cafetero*, 797 F.2d at 1160; *United States* v. *all Right, Title, Interest in Property Known as 303 West 116th Street*, 710 F. Supp. 502, 505 (S.D.N.Y. 1989)).

Claimant failed to meet that burden. At his deposition, claimant argued that while he did have daily transactions over $10,000 with the individual deposits under $10,000, it was not to avoid the law in question or its reporting requirements. He claimed that the transactions occurred to avoid the requirements of a law which requires that a person crossing the US border must report currency when $10,000 or more is imported *at one time*. Mr. Vasquez, a resident of Mexico, claimed that he, his secretary, and brother came into Douglas, Arizona multiple times on the days in question in order to avoid filing the form at the border.

Claimant's reasoning is incredible. He claimed, at the deposition, that he wanted to avoid the form at the border because it took too long to fill out. This makes no sense considering the time it must have taken to make three trips across the border, or the time it must have taken to complete three separate bank transactions. Thus, the Court finds that the government has met the burden of establishing probable cause and that the claimant has failed his burden to refute the claim. Therefore, the Court will order the defendant currency forfeited.

However, earlier this year, claimant moved for partial summary judgment as to a $50,000 certificate of deposit. The government had no objection, since the purchase amount existed in the account from which it was bought prior to the time of these events. The Court granted the motion. Thus, the Court's Order

affects only that sum of money currently held by the government.

Therefore, IT IS ORDERED, that all right, title, and interest in the defendant currency is vested in and forfeited to the United States and is the property of the United States of America and is to be disposed of according to the law; that all costs incurred by the U.S. Marshal's Service and the Clerk are to be deducted from the claimant's cost bond and the remaining amount, if any, is to be returned to the claimant.

Dated this 30 day of July, 1990.

/s/ William D. Browning
WILLIAM D. BROWNING
United States District Judge